Logisticare Solutions, Inc., a Subsidiary of Providence Service Corporation *and* Katherine A. Lee. Case 16–CA–134080

December 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On April 15, 2015, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. The parties stipulated that the Respondent maintains a rule in its new employee packet and its employee handbook that requires employees to waive the right to participate as a member of a class or collective action lawsuit or to serve as a class representative of similarly situated employees in any lawsuit against the Respondent. The judge, applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in relevant part __ F.3d __ (5th Cir. 2015), found that maintenance of the rule violated Section 8(a)(1) of the Act.

In contrast to *D. R. Horton* and *Murphy Oil*, the current case does not involve an arbitration agreement and thus does not implicate any issues involving the Federal Arbitration Act. Nevertheless, we agree that the Respondent's rule was unlawful, for the reasons stated in *Convergys Corp.*, 363 NLRB No. 51 (2015). As explained in *Convergys*, a rule requiring employees to waive their right to engage in class or group litigation explicitly restricts activities protected by Section 7 and is unlawful.[3]

2. We agree with the judge that the Respondent's rule against participating in class or collective action lawsuits was independently unlawful because employees would reasonably read the rule as restricting their right to file unfair labor practice charges with the Board.

It is well settled that a work rule violates Section 8(a)(1) if employees would reasonably believe that the rule interferes with their ability to file Board charges, even if the rule does not expressly prohibit access to the Board.[4] In determining whether employees would reasonably believe that a rule interferes with their ability to file Board charges, we interpret the rule as would "nonlawyer employees." *U-Haul Co. of California*, 347 NLRB 375, 378 (2006), 255 Fed.Appx. 527 (D.C. Cir. 2007).[5] Further, any ambiguity must be construed against the Respondent, as the party that drafted and promulgated the rule. See, e.g., *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

In everyday usage, an unfair labor practice charge filed with the Board might well be deemed a lawsuit—as Board decisions suggest.[6] Moreover, although the text of

[1] In the absence of exceptions, we adopt the judge's dismissal of the allegation that the Respondent's rule requiring employees to waive their right to a jury trial in any lawsuit they brought against the company violated Sec. 8(a)(1) of the Act.

[2] The judge found that the Respondent both maintained and enforced a rule that required employees to waive the right to engage in class or collective action lawsuits and ordered that the Respondent "[n]otify judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions that it is withdrawing those objections and that it no longer objects to such employee actions." However, there is no allegation or evidence that the Respondent ever enforced the rule in any judicial proceeding. Accordingly, we shall omit the language referred to from the Order and notice.

Because the parties stipulated that the Respondent customarily communicates with its employees by email and maintains an intranet or employee portal, we shall require the Respondent to distribute the notice through such means, in addition to physically posting the notice. See *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall further modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[3] Member Miscimarra dissented from the majority's finding in *Convergys*, and he restates his reasons for disagreeing here. We reject these arguments for the reasons given in *Convergys,* 363 NLRB No. 51, slip op. at 1 fn. 3. See also *Bristol Farms*, 363 NLRB No. 45, slip op. at 1–2 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 8 (2015); *Murphy Oil*, 361 NLRB No. 72, slip op. at 2, 16–17.

[4] See, e.g., *Hoot Winc, LLC*, 363 NLRB No. 2, slip op. at 1 (2015); *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011).

[5] See also *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994) ("Rank-and-file employees . . . cannot be expected to have the expertise to examine company rules from a legal standpoint.").

[6] See, e.g., *Smoke House Restaurant*, 347 NLRB 192, 202 (2006) (citing employee's statement that she "was going to the Labor Board and she would sue" the employer); *Carpenters Local 296 (Acrom Construction)*, 305 NLRB 822, 824 (1991) (citing union member's statement that he would "take it to the labor board and ... sue [union official's] pants off"); *Plumbers, Local 136*, 220 NLRB 850, 860 (1975) (citing union official's reference to filing of unfair labor practice charge as "National Labor Relations Board Lawsuit"); *Dolly Madison Industries, Inc.*, 182 NLRB 1037, 1039 fn. 6 (1970) (citing company offi-

the Respondent's rule purports to restrict employees' right to participate only in class or collective action *lawsuits*, the heading of the waiver section in the Respondent's new employee packet contains a much broader reference to "class/collective action" generally, with no narrowing reference to "lawsuits."[7] Thus, the heading at least introduces an ambiguity into the agreement. That ambiguity, in turn, would lead a reasonable employee to conclude that, whether or not he is free to file an *individual* unfair labor practice charge with the Board, he may not file such a charge with or on behalf of other employees without violating the rule's prohibition against "class/collective action." Section 7, however, plainly protects such concerted activity. Construing this ambiguity against the Respondent,[8] we find the Respondent's rule unlawful.[9]

ORDER

The National Labor Relations Board orders that the Respondent, Logisticare Solutions, Inc., a subsidiary of Providence Service Corporation, Austin, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule in its new employee packet and its employee handbook that requires employees, as a condition of employment, to waive the right to participate as a member or class representative of a class or collective action lawsuit against the Respondent.

(b) Maintaining a rule in its new employee packet and its employee handbook that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, nationwide, the rule in its new employee packet and its employee handbook that requires employees to waive the right to participate as a member or class representative of a class or collective action lawsuit against the Respondent.

(b) Notify all applicants and current and former employees, nationwide, that the above-described rules have been rescinded and are no longer in force.

(c) Within 14 days after service by the Region, post at all of its facilities nationwide, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since March 4, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 24, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, the Respondent maintains language in its new employee packet and employee handbook stating that applicants agree to waive their right to participate as a member of a class- or collective-action lawsuit or to serve as a class-action representative of similarly situated

cial's statement that he would "file a friendly lawsuit with the Labor Board" testing legality of contract clause).

[7] Similarly, the heading in the Respondent's employee handbook refers to a "class action waiver," with no reference to lawsuits.

[8] The ambiguity is not clarified by the text's reference to class or collective action lawsuits, which does not say that employees retain the right to file an unfair labor practice charge with the Board on behalf of, or in conjunction with, other employees. See *U-Haul of California*, above, 347 NLRB at 377.

[9] We thus disagree with our dissenting colleague that employees would understand the rule to merely refer to "procedural mechanisms."

[10] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees in any lawsuit against the Respondent.[1] Relying on the majority opinion in *Convergys Corp.*,[2] my colleagues find that the Respondent violated Section 8(a)(1) of the Act by maintaining this rule. My colleagues also find the rule unlawful on the additional ground that it restricts employees' right to file charges with the Board. For the reasons set forth below, I respectfully dissent.[3]

1. The Class- and Collective-Action Lawsuit Waiver Is Not Unlawful

The Respondent's rule incorporates a waiver of class- and collective-action procedures in pursuit of lawsuits unrelated to the National Labor Relations Act ("NLRA" or "Act"). In this respect, the rule resembles the class-action waiver agreement invalidated by the Board majority in *Murphy Oil USA, Inc*.[4] However, the agreement in *Murphy Oil* also provided for the arbitration of non-NLRA claims, which therefore implicated the Federal Arbitration Act ("FAA"). The Respondent's rule does *not* provide for arbitration of non-NLRA claims, and this renders the FAA inapplicable. Nonetheless, for the same reasons described at length in my partial dissenting opinion in *Murphy Oil*,[5] I dissent from my colleagues' finding that the Respondent's rule—specifically, the waiver of class-type procedures regarding non-NLRA lawsuits—constitutes interference with or restraint or coercion of employees' right to engage in protected concerted activity in violation of NLRA Section 8(a)(1).[6] In this regard, I emphasize the following points.

First, I agree that the NLRA protects employees from retaliation when they engage in concerted activity for the purpose of mutual aid or protection. Two or more employees enjoy Section 7 protection when they engage in activity that satisfies the requirements set forth in that section of the Act: first, "concerted" activity (i.e., activity "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself" or, where the activity involves only a speaker and a listener, speech "engaged in with the object of initiating or inducing or preparing for group action"), and second, a "purpose" of "mutual aid or protection."[7] As stated in my *Murphy Oil* partial dissent, this can include protected concerted activities in connection with non-NLRA claims (or potential claims) asserted against an employer or union.[8]

Second, Congress did not vest the Board with the authority to dictate any particular *procedures* under which non-NLRA claims are to be litigated, nor does the Act entitle employees to class-type treatment of such claims. To the contrary, as explained in my *Murphy Oil* partial dissent, I believe it is clear that Congress contemplated that procedural matters involving non-NLRA claims would be governed by the applicable statutes or laws governing such claims, supplemented by whatever additional procedural rules were authorized or adopted by Congress, State legislatures, or the courts and/or agencies vested with jurisdiction over such claims.

Third, even if employees had an NLRA-protected right to insist on the class-type treatment of non-NLRA claims, the NLRA would also protect the right of employees *not* to bring such claims on a class or group basis. In this regard, Section 7 of the Act gives every employee the right "to refrain" from NLRA-protected collective activity, which would give every employee a right to litigate non-NLRA claims individually rather than through class or collective actions. Moreover, Section 9(a) of the Act protects the right of every employee "at any time" to present and adjust grievances on an "individual" basis, and this right to resolve non-NLRA disputes at any time as an individual necessarily permits employees to waive class or collective procedures in

[1] The parties stipulated that the Respondent requires applicants to sign the class and collective action lawsuit waiver in its new employee packet before beginning employment, and that the Respondent maintains an abbreviated version in its employee handbook. This waiver is not expressly designated as a "rule." However, my colleagues use "rule" to describe the waiver, and I use the same term for ease of reference.

[2] 363 NLRB No. 51 (2015).

[3] As the majority notes, there are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by requiring employees to waive their right to a jury trial in any lawsuit they brought against the Respondent.

[4] *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part __ F.3d __ , No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

[5] *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 22–35 (Member Miscimarra, dissenting in part). As noted above in the text, the Respondent's rule does not provide for mandatory arbitration of non-NLRA claims, which renders the FAA inapplicable. Therefore, I do not rely here on Part D of my *Murphy Oil* partial dissent (id., slip op. at 34) pertaining to the FAA.

[6] My colleagues find that the Respondent's rule was unlawful for the reasons stated in *Convergys*, above. I dissented in *Convergys*, as I do here, for the reasons expressed in my partial dissenting opinion in *Murphy Oil*. See *Convergys*, above, slip op. at 3–5 (Member Miscimarra, dissenting).

[7] See *Meyers Industries*, 268 NLRB 493, 497 (1984) *(Meyers I)*, remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882, 887 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

[8] For examples of protected concerted activities pertaining to non-NLRA claims, see my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 24–25.

connection with their non-NLRA claims.[9] An employee's exercise of this right, which is affirmatively protected under the Act, cannot reasonably be deemed a violation of the same statute.[10]

2. The Class- and Collective-Action Lawsuit Waiver Does Not Interfere with the Filing of Charges with the Board

I do not agree with my colleagues' view that the Respondent's rule violates Section 8(a)(1) by interfering with the filing of Board charges.[11] In my view, any reasonable construction of the rule reveals that it applies only to class- or collective-action *lawsuits*. The rule expressly refers to "lawsuits."[12] It does not contain any broader language referring to "any" or "all" employment-related "claims" or "disputes."

The rule's explicit language notwithstanding, my colleagues find an ambiguity based on the heading for the waiver section in the Respondent's new employee packet, which reads "Jury and Class/Collective Action Waiver."[13] According to my colleagues, this language "introduces an ambiguity into the agreement" that would lead a reasonable employee to conclude that the rule prohibits him from filing an unfair labor practice charge with the Board with or on behalf of other employees. I disagree that there is any such ambiguity. A Board proceeding is not a lawsuit,[14] and the text of the rule unambiguously states that the individual executing the waiver is waiving the right to be a member of a "Class or Collective action *lawsuit*" or serve as a class representative in any "*law-*

[9] Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment." (Emphasis added.)

[10] The class- and collective-action waiver was voluntarily signed, even though applicants had to sign the waiver before beginning employment. In *Convergys*, however, my colleagues indicated the voluntariness of such a waiver is immaterial. They stated that "even if the waiver was not mandatory, it would still be unenforceable." 363 NLRB No. 51, slip op. at 1 fn. 3; see also *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (2015) (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement); *Bristol Farms*, 363 NLRB No. 45 (2015) (finding class-action waiver agreement unlawful even where employees must affirmatively opt in before they will be covered by a class-action waiver agreement, and where they are free to decline to do so). By definition, every agreement sets forth terms upon which each party may insist as a condition of entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a class-action waiver does not make it involuntary. However, the Board's position is even less defensible when the Board finds that NLRA "protection" operates in reverse—not to protect employees' rights to engage or refrain from engaging in certain kinds of collective action, but to divest employees of those rights by denying them the right to choose whether to be covered by an agreement to litigate non-NLRA claims on an individual basis. See *Bristol Farms*, above, slip op. at 4 (Member Miscimarra, dissenting).

[11] In analyzing whether a work rule is unlawfully overbroad with respect to whether employees may file Board charges, the Board has applied the first prong of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), i.e., whether "employees would reasonably construe the language [of the waiver] to prohibit Section 7 activity." See, e.g., *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (quoting *Lutheran Heritage*, supra), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). As I explained in my partial dissenting opinion in *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), enfd. mem. No. 14–3284, 2015 WL 6161477 (2d Cir. Oct. 21, 2015), I would reexamine this standard in an appropriate future case, but here, even under the *Lutheran Heritage* standard, I believe the Respondent's class- and collective-action lawsuit waiver rule should be found lawful.

[12] The Respondent's new employee packet states that employees waive the right "to participate as a member of a Class or Collective action lawsuit and/or serve as a class representative of similarly situated employees in any lawsuit against the company." Similarly, the employee handbook provides: "The Company also requires all employees as a condition of employment to waive any right you may have to be a member of a Class or Collective action lawsuit or a representative of a Class or Collective action lawsuit against the Company."

[13] The heading of the waiver provision in the employee handbook reads "Class Action Waiver."

[14] The Board's own website makes clear that employees file a "charge," not a "lawsuit" with the Board. E.g., "What We Do: Investigate Charges" (https://www.nlrb.gov/what-we-do/investigate-charges) ("If you believe your NLRA rights have been violated, you may file a charge against an employer or a labor organization."); "Resources: the NLRB Process" (https://www.nlrb.gov/resources/nlrb-process) (describing process as beginning with a "charge" filed with Regional Director). The rule also refers to waiving the right to participate as a "member" or serve as a "class representative of similarly situated employees." These terms further clarify that the rule does not encompass the filing of unfair labor practice charges with the Board, since employees who file Board charges are referred to as "Charging Parties." My colleagues find that employees would reasonably construe Respondent's agreement to bar the filing of NLRB charges because, in four cases that span a 36-year period, certain individuals incorrectly used the terms "lawsuit" or "sue" when describing NLRB proceedings. I respectfully disagree with my colleagues' analysis. The Board can reasonably expect parties to construct agreements using words and phrases in line with their actual meaning. The Board has not rendered such agreements unlawful merely because a few individuals may *incorrectly* attach a different meaning to the same words and phrases. As the Board stated in *Lutheran Heritage*, above, 343 NLRB at 647: "Where . . . the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach" (emphasis in original; footnote omitted).

suit" against the Respondent (emphasis added).[15] I believe it is contrary to *Lutheran Heritage* to ignore the unambiguous text and focus on the heading in isolation. See *Lutheran Heritage*, 326 NLRB at 646 (in determining whether a challenged rule is unlawful, the Board "must refrain from reading particular phrases in isolation"). Reading the waiver agreement as a whole, I would find that it does not restrict employees from exercising their right to file charges with the Board.

Even detaching the heading from its context, I would reach the same conclusion. The terms "class action" and "collective action" refer to specific procedural mechanisms.[16] The Board does not use these terms to refer to its own proceedings, including when a charge is filed by or on behalf of more than one employee.[17] Even if one applies the perspective of "nonlawyer employees,"[18] I do not believe anyone would reasonably conclude that the heading, "Jury and Class/Collective Action Waiver," means an unfair labor practice charge cannot be filed with the NLRB. Indeed, I believe that such an unlikely interpretation could *only* be adopted by lawyers and others who have a formal legal education, and even then, I believe it strains reasonableness to suggest that "Jury and Class/Collective Action Waiver" has something to do with NLRB charge-filing. Of course, one would also reasonably expect lawyers and others—with or without a formal legal education—to read the actual text that appears beneath the heading.

As a final matter, I believe the majority's decision improperly suggests that any use of general language in employment-related documents (indeed, the offending provision here consists of a six-word heading) is presumptively unlawful whenever there is some type of potential ambiguity. Generalized provisions related to employment—even those relating to discipline and discharge—have been deemed acceptable throughout the Act's history.[19]

Accordingly, for the reasons stated above, I respectfully dissent.

Dated, Washington, D.C. December 24, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[15] My colleagues also say the ambiguity they find "is not clarified by the text's reference to class or collective action lawsuits" absent express language stating that "employees retain the right to file an unfair labor practice charge with the Board on behalf of, or in conjunction with, other employees." Since there is no ambiguity, there is no need for clarification. In my view, the repeated use of the term "lawsuit" makes clear that the rule does not apply to the filing of Board charges.

[16] "Class action" refers to specialized procedures in which a named plaintiff litigates claims on behalf of himself and absent parties pursuant to detailed requirements set forth in the applicable Federal or state rules of civil procedure. See, e.g., "class action," Black's Law Dictionary (10th ed. 2014). A "collective action" is a procedure pursuant to which wage and hour claims may be litigated under the Fair Labor Standards Act. See 29 U.S.C. § 216(b).

[17] The Board does not recognize any procedures permitting class or collective actions. The Board's procedure for aggregating unfair labor practice charges is referred to by a different term, "consolidation."

[18] *U-Haul Co. of California*, 347 NLRB 375, 378 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007).

[19] Linguistic perfection has not been required in other types of employment provisions enforced by the Board and the courts. As I have stated elsewhere:

> It does not per se violate Federal labor law to use a general phrase to describe the type of conduct that may [result in discipline or discharge]. If it did, "just cause" provisions contained in most collective-bargaining agreements that have been entered into since the Act's adoption nearly 80 years ago would be invalid. However, "just cause" provisions have been called "an obvious illustration" of the fact that many provisions "must be expressed in general and flexible terms." More generally, the Supreme Court has stated, in reference to collective- bargaining agreements, that there are "a myriad of cases which the draftsmen cannot wholly anticipate," and "[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words . . . the exclusive source of rights and duties."

Triple Play Sports Bar & Grille, 361 NLRB No. 31, slip op. at 11 (2014) (Member Miscimarra, dissenting in part), enfd. __ F.3d __, 2015 WL 6161477 (2d Cir. Oct. 21, 2015) (quoting *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 578–579 (1960); Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv.L.Rev. 1482, 1491 (1959)) (other citations and internal quotation marks omitted).

Ironically, the Board itself in *Lutheran Heritage* stated: "Work rules are necessarily general in nature . . . . We will not require employers to anticipate and catalogue in their work rules every instance in which [prohibited types of speech] might conceivably be protected by (or exempted from the protection of) Section 7." 343 NLRB at 648.

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule in our new employee packet and our employee handbook that requires you to waive the right to participate as a member or class representative of a class or collective action lawsuit.

WE WILL NOT maintain a rule in our new employee packet and our employee handbook that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the rule in our new employee packet and our employee handbook that requires you to waive the right to participate as a member or class representative of a class or collective action lawsuit against the Respondent.

WE WILL notify all our employees that the above-described rules have been rescinded and are no longer in force.

LOGISTICARE SOLUTIONS, A SUBSIDIARY OF PROVIDENCE SERVICE CORPORATION

The Board's decision can be found at www.nlrb.gov/case/16-CA-134080 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Linda Reeder, Esq., for the General Counsel.
Lawrence McNamara, Esq., Ford Harrison, LLP, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. The parties herein waived a hearing and submitted this case directly to me by way of a joint motion and stipulation of facts received on March 9, 2015. The complaint, which issued on November 25, 2014,[1] and was based upon a charge and a first amended charge filed on August 4 and September 17 by Katherine Lee, alleges that Logisticare Solutions, Inc., a subsidiary of Providence Service Corporation, herein called Respondent, promulgated and maintained Jury and Class and Collective Action waivers that employees and prospective employees were required to sign, and it is alleged that requiring employees and applicants for employment to sign and agree to these waivers violates Section 8(a)(1) of the Act.

The Joint Motion and Stipulation of Facts provides as follows:

1. The charge in this proceeding was filed by the Charging Party, Katherine E. Lee on August 4, and a copy was served by regular mail on the Respondent on August 5.

2. The first amended charge in this proceeding was filed by Lee on September 17 and a copy was served by regular mail on Respondent on the same date.

3. On November 25, the Regional Director for Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing, and a copy was served by mail on Respondent and Charging Party on the same day.

4. Respondent electronically filed an Answer on December 9.

5. The Regional Director issued an Order Postponing the Hearing Indefinitely on February 26, 2015.

6. At all material times, Respondent has been a Delaware limited liability company with an office and place of business located in Austin, Texas and has been engaged in the business of arranging transportation for Medicare patients.

7. In conducting its operations during the last twelve months, Respondent performed services valued in excess of $50,000 in states other than the State of Texas.

8. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

9. Ruby Stephens formerly held the position of Respondent's Human Resources/Training Manager from February 2, 2012 until July 1, 2014, and during those times was a supervisor within the meaning of Section 2(11) and an agent of Respondent within the meaning of Section 2(13) of the Act.

10. Since about March 4, 2014, Respondent has maintained the following rule in its new employee packet:

Jury and Class/Collective Action Waiver

Jury Waiver:

> Jury trials add unnecessary expense and time to a legal process that is already too expensive and slow. Your signature below indicates that you understand that as a condition of your application and possible employment, any lawsuit that you may bring against the company will be decided by a judge, without a jury. To the extent permitted by law, you are knowingly, voluntarily, and intentionally waiving any right you may have to a trial by jury in any litigation arising out of your employment with the company.

Class Action and Collective Action Waiver:

> Class and Collective Action lawsuits have been abused recently by trial lawyers forcing American companies to pay large settlements, not because the cases have merit or because

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2014.

the Company violated any laws, but because the suits are too expensive to litigate and the company is left with no reasonable alternative. Class and collective action suits primarily benefit the trial lawyers and rarely accomplish any other objective. There are more effective ways to protect your individual employment related rights than through a Class and Collective action lawsuit. Your signature on this document indicates that you agree to waive any right you may have to be a member of a Class and Collective action lawsuit against the company.

I hereby acknowledge and understand that as a condition of my employment:

*I am waiving my right to have a trial by jury to resolve any lawsuit related to my application or employment with the Company.

*I am waiving my right to participate as a member of a Class or Collective action lawsuit and/or serve as a class representative of similarly situated employees in any lawsuit against the Company.

11. Respondent requires that job applicants, such as the Charging Party, sign the Jury and Class/Collective Action Waiver found in its new employee packet before beginning employment.

12. Respondent maintains an abbreviated form of the above-referenced Jury and Class/Collective Action Waiver in its Employee Handbook. The rule in the Employee Handbook reads:

2.9 Jury and Class Action Waiver

Jury trials add unnecessary expense and time to a legal process that is already expensive and slow. It is important that each employee understand that the Company requires all employees, as a condition of employment, to agree that any lawsuit that you may bring against the Company will be decided by a judge, without a jury. As an employee with our Company, to the extent permitted by law, you are knowingly, voluntarily, and intentionally waiving any right you may have to a trial by jury in any litigation arising out of your employment with the Company.

The Company also requires all employees as a condition of employment to waive any right you may have to be a member of a Class or Collective action lawsuit or a representative of a Class or Collective action lawsuit against the Company.

13. Respondent maintains its Jury and Class Action Waivers at all of its locations including:

(a) 12234 North Interstate 35, Austin, TX78753;
(b) 798 Park Ave. NW, Suite 600, Norton, VA 24273–1986;
(c) 711 N. Jefferson St., Suite C, Albany, GA 30349–8607;
(d) 503 Oak Place, Suite 550, Atlanta, GA 30349–8607;
(e) 401 Mall Blvd., Suite 202A, Savannah, GA 31406–4867;
(f) 777 Southland Dr., suite 235, Hayward, CA 94545–1564;
(g) 823 NW 12th St., Suite 109, Miami, FL 33126;
(h) 8405 Colesville Rd., Silver Spring, MD 20910–3317;
(i) 515 Main St. Suite 2, Wallingford, CT 06492–1736;
(j) 3718 Northern Blvd., Long Island City, NY 11101–1631;
(k) 1275 Peach St. NE, Suite 600, Atlanta, GA 30309–7517;
(l) 400 S. Farrell Dr., Suite 209, Palm Springs, CA 92262–7964;
(m) 2114 Angus Rd., Suite 200, Charlottesville, VA 22901–2770;
(n) 2552 W. Erie Dr., Suite 101, Tempe, AZ 85282–3100;
(o) 170 Weston St., Hartford, CT. 06120–1512;
(p) 5649 S. Laburnum Ave., Richmond, VA; and
(q) 7441 Lincoln Way, Suite 225, Garden Grove, CA 92841–1447.

14. The parties stipulate that Respondent maintains the above-referenced Jury, Class Action and Collective Action Waiver.

15. Respondent communicates with its employees concerning matters pertaining to wages, hours and other terms and conditions of employment by email and maintains an intranet or employee portal through which it also communicates with employees about wages, hours and other terms and conditions of employment.

16. The issue presented in this case is:

Whether, under the facts of this case, Respondent's maintenance of a Jury, Class Action and Collective Action Waiver interferes with employees' Section 7 rights to participate in collective and class litigation, interferes with employees' access to the Board and its processes, and restricts employees' abilities to discuss their terms and working conditions with one another, in violation of Section 8(a)(1) of the Act.

Analysis

The Respondent's Class and Collective Action Waiver falls within the realm of *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), *Murphy Oil, USA, Inc.,* 361 NLRB No. 72 (2014), and *Cellular Sales of Missouri, LLC,* 362 NLRB No. 27 (2015). *Horton* applied the test as set forth in *Lutheran-Heritage Village-Livonia*, 343 NLRB 646 (2004), which stated that the initial inquiry is whether the rule at issue explicitly restricts activities that are protected by Section 7 of the Act; if so, it is unlawful. If not, the finding of a violation is dependent upon a showing of one of the following: employees would reasonably construe the rule to prohibit protected activity or the rule has been applied to restrict the exercise of this activity. The Board, in Horton, found that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial" as a condition of employment, 357 NLRB No. 184, slip op. at 12. In *Murphy Oil,* supra, at page 2, the Board stated that although *Horton* was rejected by the U.S. Court of Appeals for the Fifth Circuit and was viewed as unpersuasive by the Second and Eighth Circuits: "We have independently reexamined *D. R. Horton*, carefully considering the Respondent's arguments, adverse judicial decisions, and the views of our dissenting colleagues. Today we reaffirm that decision. Its reasoning and result were correct . . ." As these decisions are still Board law, even though some courts have disagreed, until the Board or the Supreme Court rule differently, I am constrained to follow the precedent set forth in these decisions. Counsel for the Respondent defends that its waiver provisions are focused on juries, courts, and principally lawsuits, and therefore do not prohibit

access to the Board. Counsel argues in his brief that there is no ambiguity or inconsistency in Respondent's rules and that employees could not reasonably believe that the required waivers would prohibit him/her from filing an unfair labor practice charge with the Board. I disagree and find that the average lay person could not reasonably be expected to discern the difference between lawsuits and Board proceedings. *D. R.* Horton, enf. denied in part, 737 F.3d 344, 363 (5th Cir. 2013). I therefore find that as the Class and Collective Action Waiver bars its employees from collectively pursuing litigation of employment claims, and that its employees could reasonably assume that it also bars them from filing charges with the Board, it violates Section 8(a)(1) of the Act.

The Jury Waiver that the Respondent requires of its employees and applicants for employment, states that ". . . any lawsuit that you may bring against the company will be decided by a judge, without a jury. To the extent permitted by law, you are knowingly, voluntarily, and intentionally waiving any right you may have to a trial by jury in any litigation arising out of your employment with the company." Unlike the required waiver of class or collective actions, I am unaware of any case finding the right to have a trial by a jury, rather than a judge, to be protected conduct under the Act, and counsel for the General Counsel does not cite any such cases in her brief. Under *Lutheran-Heritage*, supra, the initial inquiry is whether this rule explicitly restricts activities protected by Section 7 of the Act. The Jury Waiver does not affect any collective right; it speaks only of individual employees waiving his/her right to a trial by a jury, and I fail to see how a trial before a jury, rather than a judge, is protected by Section 7 of the Act. Completing the analyses under *Lutheran-Heritage,* I find that employees would not reasonably construe this waiver to prohibit protected activity, and there is no evidence that this rule has been applied to restrict that activity. I therefore find that the Jury Waiver does not violate Section 8(a)(1) of the Act, and recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining and enforcing a provision in its Employee Handbook whereby its employees and applicants for employment waived the right to engage in class or collective action with other employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has violated Section 8(a)(1) of the Act.

3. Respondent has not violated the Act as further alleged in the complaint.

REMEDY

Having found that the Respondent has violated the Act by maintaining a rule prohibiting class and collective action, I recommend that Respondent be ordered to cease and desist from enforcing this policy, and to post the Board Notice set forth below at each of its locations where the restriction is in effect. Further, I recommend that Respondent be ordered to notify all judicial panels, if any, where it has attempted to enjoin, or otherwise prohibit, employees from bringing or participating in class or collective actions, that it is withdrawing these objections and that it no longer objects to such employee actions.

Upon the foregoing findings of fact, conclusions of law and based upon the entire record, I hereby issue the following recommended[2]

ORDER

The Respondent, Logisticare Solutions, Inc., a subsidiary of Providence Service Corporation, Austin, Texas, its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Prohibiting its employees and applicants for employment from filing unfair labor practice charges with the Board or participating in class and collective actions against the Respondent.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Notify all employees and applicants for employment at locations where the restriction is in effect, that it will no longer maintain or enforce the prohibition of class and collective actions against the Respondent referred to in the employee handbook.

(b) Notify judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions that it is withdrawing those objections and that it no longer objects to such employee actions.

(c) Within 14 days after service by the Region, post at each of its facilities where the Dispute Resolution Policy is maintained or enforced, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4,

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

2014.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C April 15, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a rule that prohibits our employees, or applicants for employment, from participating in a class or collective action lawsuit against us or from filing unfair labor practice charges with the Board and WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our requirement that employees, and applicants for employment, agree to waive their right to participate in class or collective action lawsuits against us, and WE WILL amend our employee handbook to withdraw this restriction and WE WILL notify all employees or applicants for employment that this has been done.

LOGISTICARE SOLUTIONS, A SUBSIDIARY OF PROVIDENCE SERVICE CORPORATION